

Indian Head Lubricants, Inc. and Henry Williams.
Cases 39-CA-186 and 39-RC-18

April 8, 1982

**DECISION, ORDER, AND DIRECTION
OF SECOND ELECTION**

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On May, 26, 1981, Administrative Law Judge Theodor P. von Brand issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and Respondent filed an answer to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

1. We agree with the Administrative Law Judge that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Because the Administrative Law Judge inadvertently omitted a recitation of the undisputed jurisdictional facts on which that finding is based, we shall set them forth. Respondent is engaged in the wholesaling and distribution of oils, lubricants, and related products. During the calendar year ending December 31, 1979, in the course and conduct of its business operations, Respondent received at its North Branford, Connecticut, facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Connecticut.

2. We also agree with the Administrative Law Judge that Respondent laid off employee Henry Williams because of his known union activities, in violation of Section 8(a)(3) and (1) of the Act. According to the summary of business activity submitted by Respondent, its sales fell off substantially in December 1979. From that point, sales remained relatively stable through March 1980, when Respondent laid off Williams, until business picked up in June 1980. Between December and March, Re-

spondent did not lay off any employees in response to the business slowdown. In late February, Respondent offered Williams \$600 and a job for life in return for his vote against the Union in the March 5 election. Williams refused the bribe, but Respondent succeeded in defeating the Union by bribing employee Cary Darden III with a \$2 raise and \$1,500 in cash. Respondent's president and owner, Frank Zemina, informed Williams that he was being let go because "things are slowing up around here." Williams asked Zemina whether he would be called back "if it looked like work was going to be picking up." Zemina answered that this was "doubtful." Viewed in isolation, the business slowdown might have justified a layoff. This entire chain of events, however, undermines the persuasiveness of Respondent's contention that the layoff was its response to the December 1979 slowdown. In addition, Zemina's statement, the most reasonable construction of which is that it was doubtful he would recall Williams even if business picked up, further undermines the asserted correlation between the slowdown and the layoff.² In short, we agree with the Administrative Law Judge in concluding that Respondent laid off Williams because of his union activities, in violation of Section 8(a)(3) of the Act.³

3. We agree with the Administrative Law Judge that it would not serve the policies of the Act to provide a remedy for Respondent's refusal to reinstate Cary Darden III. Darden conspired with Respondent to subvert the Board's processes by offering to vote against the Union in the Board-conducted representation election and solicited and received a \$1,500 bribe for doing so. By such conduct, Darden made it inappropriate for the Board to order him restored to Respondent's employ where he may be used again as Respondent's agent for unlawful purposes. Neither is an award of back-pay appropriate in these circumstances. Darden's flagrant and malicious subversions of the Act's pur-

² In fact, when its sales volume recovered Respondent failed to recall Williams. While Respondent argues that it was able to perform all the necessary work in its warehouse, where Williams had been employed, with one remaining employee, that contention is belied by the fact that it created a new position, warehouse manager, and that thereafter the warehouse was manned by two employees, the same number as before Williams' layoff. To this limited extent we disagree with the Administrative Law Judge's unwillingness to draw any inferences from Respondent's hiring of the warehouse manager.

³ Member Jenkins considers to be correct the Administrative Law Judge's statement that *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), provides a "rule for determining causality in so-called dual motive cases when the record indicates that both legitimate business reasons and the desire to retaliate for protected activities may have motivated the actions charged unlawful." But the Administrative Law Judge found the asserted lawful reasons for the discharge to be "not convincing." Thus, only one genuine reason for the discharge existed, the unlawful one. Member Jenkins considers reliance on *Wright Line* in such situations to be erroneous and misleading.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

poses and processes bars him from participating in these processes to obtain a remedy for himself for misconduct which was an integral part of his and Respondent's subversion of the Act.

4. The conduct of Darden and Respondent cannot be divorced from its obvious impact on the election. Darden accepted a bribe and sold his vote to Respondent. After the election, he confirmed to Respondent that he had voted against the Union. Thus, Respondent "bought" the election by means of a conspiracy that subverted the Board's processes and deprived the employees casting honest ballots of the opportunity to have their majority vote registered. This evidence, however, was not before the Regional Director when he certified the results of the election, and because the evidence was unavailable, it was not possible for the Union to file an objection to this conduct which affected the results of the election. In the extraordinary circumstances presented here, we hereby exercise our discretion to reopen Case 39-RC-18 in order to consider this newly discovered evidence. See *Magnesium Casting Company v. N.L.R.B.*, 401 U.S. 137, 139-140 (1971). Having considered it, we hereby direct the Regional Director for Region 1 to set the election aside and to conduct a second election in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Indian Head Lubricants, Inc., North Branford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.⁴

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

⁴ Interest on any backpay shall be as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). Member Jenkins would award interest on the backpay due in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

DECISION

PRELIMINARY STATEMENT

THEODOR P. VON BRAND, Administrative Law Judge: Henry Williams a former employee of Respondent Indian Head Lubricants, Inc. (herein called Indian Head), who was laid off on or about March 21, 1980, initiated this proceeding with a charge of unfair labor practices dated April 1, 1980. The National Labor Relations Board subsequently filed a complaint dated May 20, 1980. An amended charge dated September 30, 1980, was

followed by the amended complaint which issued on October 8, 1980.

The amended complaint alleges essentially that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act), by activities such as the following: interrogating employees regarding their union sympathies, threatening employees with loss of benefits and other unspecified reprisals to discourage employees from selecting the Union as their bargaining representative, threatening employees with plant closure if the employees selected the Union, threatening to sell Respondent's business in order to discourage employees from selecting the Union offering employees financial benefits if they rejected the Union as their collective-bargaining representative, threatening employees with more onerous working conditions if they selected the Union, creating the impression that employees were under surveillance for union activities, threatening employees with termination because of union sympathies, and threatening employees with discharge if they selected the Union.

The amended complaint also alleges in substance that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating with respect to the hire, tenure, or conditions of employment thus discouraging membership in a labor organization. The following acts are specifically alleged as violating Section 8(a)(3) and (1): instituting a new disciplinary program while the union campaign was pending, withdrawing certain coffee privileges, instituting the use of a timeclock, discharging Henry Williams on or about March 21, 1980, providing employees with financial benefits, and refusing to reinstate Cary Darden III on or about late August or early September 1980.

Respondent generally denied the substantive allegations of the amended complaint. In addition, Respondent asserted the following affirmative defenses: First, the Charging Party, Henry Williams, was laid off due to lack of work; second, the allegations of the amended complaint are irrelevant to the charge filed by Henry Williams; third, the allegations of the amended charge and the related allegations of the amended complaint are untimely; and fourth, the issue of a wholly new complaint under the guise of the amended complaint is a subterfuge denying Respondent due process.

FINDINGS OF FACT

A. Identity of Respondent and the Union

Indian Head Lubricants, Inc., is a Connecticut corporation with an office and place of business in North Branford, Connecticut, engaged in the wholesale and distribution of oils, lubricants, and related products.

Indian Head is now and at all times material herein has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. Respondent's Personnel

Respondent employed approximately 20 employees in the relevant period. Six were employed in the warehouse

and in the capacity of drivers. The balance of the employees worked in the office and on the sales force.

Frank Zemina, president and treasurer of the Corporation, who owns all of its stock, is the chief operating officer.

Ottie Zemina, wife of Frank Zemina, is secretary and the only other officer of the Corporation. As of March 1980, Mrs. Zemina was not on the payroll. Nevertheless, Mrs. Zemina in that month came to the office 20 hours a week. Although most of her work was confined to the front office, she knew most of the people on Indian Head's payroll.

Paul Zemina, the son of Frank and Ottie Zemina, is employed as an inside salesman at Indian Head.

John Calcagni, Respondent's personnel manager, is a supervisor within the meaning of the Act.

Connie Godshall is an accountant who worked as Indian Head's bookkeeper in the relevant time period. She is cognizant of Respondent's financial information and thus has access to confidential information.

Eugene Serafin worked in Indian Head's warehouse in the relevant period. He had no authority to hire or fire but supervised the work of the other employees in the warehouse. For example, truckdrivers, such as Richard Whittaker, reported to him and he was the immediate supervisor of warehousemen, such as Henry Williams. Serafin, if there were no work, would tell employees such as Blakeslee to go home early. Serafin sometimes assigned deliveries to drivers and gave them orders to load the trucks. Robert Blakeslee, a truckdriver, if he had trouble on the road, reported to Serafin. If the men were not busy, Frank Zemina, Indian Head's chief operating officer, would tell Serafin to find something for them to do. Serafin responsibly directed the work of Respondent's warehousemen and drivers within the meaning of Section 2(11) of the Act.

Henry Williams, the Charging Party, is a former employee of Indian Head. He was hired by Respondent's owner and chief operating officer Frank Zemina on August 15, 1979. His duties included loading and unloading trucks and waiting on walk-in customers. Williams also substituted for regular drivers when necessary. His job classification was that of assistant warehouse foreman and truckdriver. Williams was laid off on or about March 21, 1980, after the bargaining election of March 5.

Richard Whittaker, who is currently unemployed, was employed as a truckdriver by Indian Head in the period December 1975 to July 1980.

Robert Blakeslee has been employed as a truckdriver by Respondent since 1978.

Cary Darden III is currently unemployed. Formerly, he worked as a truckdriver for Indian Head where he was hired in September 1979. Darden was injured on the job on March 12, 1980, and since that time has not returned to work.

C. Chronology of the Attempt To Unionize Indian Head

Henry Williams, Richard Whittaker, and Robert Blakeslee in late October or early November 1979 discussed the selection of a union as a bargaining representative. In late January 1980, Williams, Whittaker, and Blakeslee

went to the union hall, signed authorization cards, paid the \$25 initiation fee and joined the Union.

On January 28, 1980, the Union filed a petition with the Board to represent certain of Respondent's employees. On February 6, 1980, a notice of representation hearing issued in Case 39-RC-18 which was served on the Respondent and the Union. The proposed bargaining unit was the following:

All full-time drivers and regular part-time truckdrivers and warehouse employees employed by Respondent at its North Branford, Connecticut, location but excluding office clericals, salesmen, professional employees, guards, and supervisors as defined in the Act.

On Friday 13, 1980, the Union and Respondent executed a Stipulation for Certification Upon Consent Election in Case 39-RC-18. On the same date the Union and Respondent stipulated that six employees were the only individuals eligible to vote in this election. The stipulated employees were the following:

Eugene Serafin
Richard Whittaker
Robert Blakeslee
Cary Darden III
Henry Williams
Louis Conforte

The representation election was held at 8:30 a.m. on March 5, 1980, at Indian Head's premises. Six votes were cast—three for the Union and three against. The Board accordingly certified the results of the election as showing that a majority of the valid ballots had not been cast for any labor organization appearing on the ballot and that no such organization is therefore the exclusive representative of all the employees involved within the meaning of Section 9(a) of the Act.

On the afternoon of March 5, 1980, Frank Zemina had a celebration in his office with champagne.

D. Employer-Employee Contacts Concerning the Union

Eugene Serafin was aware that Williams, Whittaker, and Blakeslee were in favor of the Union.

1. Henry Williams

About a week after Blakeslee, Whittaker, and Williams had gone to the union hall, Paul Zemina walked up to Williams and asked whether his father, Frank Zemina, had done anything to Williams. Paul Zemina also asked Williams "aren't you happy with the job and the money you are making here." Williams laughed and Paul Zemina turned away.

About a week and a half before the election Connie Godshall approached Williams in the warehouse. Godshall told him that, if he would give her a statement in writing that he would work against the Union, she would pay off his outstanding debt at Indian Head.¹

¹ At that time Williams' wages were being attached by a court order.

When Williams stated that Godshall could not do this without Frank Zemina's authorization, she replied that Zemina would authorize it and that she would make out her personal check for this amount.

Williams had a second conversation with Miss Godshall later the same day at Poppeys Restaurant in North Branford. Godshall came in as Williams was about to leave; she sat down at his table, ordered a cup of coffee, and held up a personal check made out to Williams in excess of \$600 postdated to March 6, 1980. She stated "see I can do it" and "think it over." Williams thereupon left the restaurant.

The following morning Godshall approached Williams in the warehouse asking him whether he had given any thought to the offer. Williams replied that he had not. Godshall thereupon stated that he should give it some thought or working conditions would become tighter with respect to such matters as reporting time, etc. Godshall in that conversation also told Williams that, if he would vote against the Union, he would have a job for life at Indian Head.

When the free coffee disappeared in the first or second week of January 1980, Williams asked Paul Zemina if the latter's mother would pick up more coffee. Paul Zemina replied that and a lot of other favors would stop.

About a week before the representation election of March 5, 1980, Ottie Zemina showed two men in business suits around the warehouse. Mrs. Zemina subsequently returned and approached Williams stating that the two men she had shown around had made a substantial offer to purchase the business and to retain Frank Zemina to run it. She said to Williams "wouldn't that shake up a few people."

On March 5, 1980, after the Union had lost the election, Mrs. Zemina walked from the front office ripped down the NLRB notice signs, walked to within 3-1/2 to 4 feet of Williams and tore up the signs. According to Williams "she had a little grin on her face."

Williams' last day at Indian Head was March 21, 1980. At 3:45 p.m. Frank Zemina told Williams that he would be let go since work was slow. Williams asked Zemina why he did not let Cary Darden go since the latter had less seniority. Zemina replied that Darden had been hired as a truckdriver and Williams had not. Williams asked if he would be recalled if work were to pick up and Zemina replied this was doubtful. Williams had been given no indication prior to March 21 that he would be laid off.

2. Cary Darden III

In late January or early February 1980, Frank Zemina gave Cary Darden a ride to work. On the way Zemina asked Darden if any one was bending his ear about the Union. Darden replied that he did not know what Zemina was talking about. Zemina then interjected "you know what I'm talking about." Darden replied no one was bending his ear and he would do what he wanted to do.

At the end of January 1980, Ottie Zemina, the secretary of Indian Head, gave Darden a ride to Branford Green. On the way she asked Darden did he know any-

thing about the Union coming in. Darden at that time replied that he knew nothing.

In another conversation with Ottie Zemina, some 3 weeks before the election, Mrs. Zemina told Darden that he knew something was going on with respect to the Union coming in. She then asked Darden how he would vote in that election. He replied that he did not know. Mrs. Zemina in that conversation stated that if the Union came in Frank Zemina would close the shop and everybody would be out of work.

Darden had a conversation with Connie Godshall about 3 weeks to a month before the election. On his return to Respondent's place of business with his truck, Godshall told Darden that she had been waiting for him and would give him a ride to his girlfriend's house in New Haven. On the way Godshall asked Darden about the Union telling Darden "if the Union comes in how Frank was going to close the place up. If the back closes, the front's going to close up, and that there's no way the Union should come in here." When asked whether he knew anything about the Union coming in, Darden responded affirmatively and in response to Godshall's further question replied that he did not know how he would vote in the election.

About 2 weeks before the election, Darden had another conversation with Godshall. Frank Zemina had previously come up to Darden stating he could not talk to the employee, because if he did it would be tampering with the Union's organizing effort, but that Connie Godshall would talk to Darden later that day. The same day Connie Godshall came to see Darden in the warehouse. They went upstairs to the filter room and Godshall again asked Darden how he would vote. Darden replied:

I told her if I got two dollars raise and fifteen hundred dollars cash, than I would vote that the Union don't come in.

Godshall stated that she would take it up with Frank Zemina and let Darden know.

A week before the election, Darden had another conversation with Connie Godshall. Darden had been out on the truck returning to Indian Head's premises about 5 o'clock. Godshall came in and said she would take Darden home. She did not take Darden home, however. Rather, they went to a club, to give other employees the impression that Darden and Godshall had gone home. They, in fact, intended to return to Respondent's place of business after everyone had left. In the club Godshall and Darden ordered drinks and she told him that Frank Zemina had agreed to the \$1,500 and the \$2 raise. After a couple of hours, they returned to Frank Zemina's office at Indian Head. At this meeting, Frank Zemina and Darden agreed upon the \$1,500 and the \$2 raise. The \$1,500 was to permit Darden to purchase a car to go to work. In the course of this conversation, Frank Zemina stated that the shop would have to close if the Union came in, since he had no money to pay the Union. During this conversation, Zemina also stated that he would fire Henry Williams, Robert Blakeslee, and Richard Whittaker for trying to get the Union into the shop.

Darden in the course of this meeting informed Frank Zemina that he had been convicted and imprisoned for armed robbery. He made the disclosure because he wanted to stay with Indian Head and wanted to rehabilitate himself.²

Darden, on the morning of March 5, 1980, voted in the election and then went out on the truck. At 12, he returned to the office and went to see Frank Zemina about the money. Darden described these events as follows:

. . . And, at first he didn't want to pay the money. I told him that I did what I was supposed to do and now it's your turn. He wanted me to wait a couple of weeks before he wanted to give me the money.

Q. What money?

A. The fifteen hundred dollars.

* * * * *

So then we went into the accounting office and eventually they made up this check for fifteen hundred dollars. Ottie took me to the bank down the street and I cashed the check. And, then she took me to the Branford Green and dropped me off. And, then from there I went to the car place and bought my car.

Frank Zemina also gave Darden a bottle of champagne congratulating Darden on the failure of the Union organizing effort "because of what I [Darden] did."

Frank Zemina stated he did not want Darden to bring the car to work because he felt the other employees would infer that he had been paid off with a car. So Darden parked in the shopping center.

Darden had asked Frank Zemina for a loan on two additional occasions prior to the March 5, 1980, election. One occasion was in December 1979, the other January or early February 1980. On both occasions Zemina refused.³

On May 6, 1980, Darden signed a demand note, General Counsel's Exhibit 7, stating as follows:

232 Branford Road, Route 139
North Branford, Conn. 06471

May 6, 1980

ON DEMAND

I, CARY DARDEN, THIRD, PROMISE TO
PAY TO THE ORDER OF INDIAN HEAD LU-
BRICANTS, INC. TWO THOUSAND TWENTY
FIVE DOLLARS (\$2,025.00).

Cary Darden, Third

² Despite this disclosure to Zemina, Darden in his testimony maintained that the purpose of the meeting was to ask for the \$1,500 and the \$2 raise for the Union not coming in. Since he received both shortly thereafter, this explanation is found credible.

³ Zemina explained these prior refusals on the ground that Darden had a ride to work in December 1979 and that, when Darden again approached him after losing his ride in late January or early February, the NLRB proceeding was pending and this precluded him from showing favoritism by giving any employee money.

LIST OF ADVANCES

3/5/80 Check No. 16456	1500.00
3/19/80 Check No. 16544	50.00
3/24/80 Check No. 16550	100.00
3/28/80 Check No. 16561	100.00
3/11/80 Paid on Account	-50.00
3/18/80 Paid on Account	-25.00
4/4/80 Check No. 16582	50.00
5/1/80 Check No. 16658	100.00
5/5/80 Check No. 16689	200.00
Total amount due on demand	2025.00

Darden, when he signed General Counsel's Exhibit 7, was told by Frank Zemina that it was necessary to put this document in the file to show there were no illegal goings on, and that Darden was to say that it represented a loan.⁴

According to the demand note he signed, Darden paid \$50 on account on March 11, 1980, and \$25 on account on March 18, 1980. There is no evidence in the record that he made any additional payments.

On March 12, 1980, Darden received the \$2 pay raise he had requested.

On March 12, 1980, Darden was injured in an on-the-job accident and has not returned to work since that time. Since his injury Darden came back to Indian Head six or seven times to ask for additional money and that he be returned to work. Zemina acknowledged advancing additional sums to Darden in the period March 12-May 6, 1980, over and above the \$1,500 handed over on March 5.

Darden was under the care of a Dr. Massey for the accident of March 12, 1980, and was discharged by him on April 25, 1980. Respondent asserts that Darden was not reinstated because he failed to provide Indian Head with a release from the physician. Darden's testimony that he advised Zemina of his discharge from treatment at approximately the time it occurred toward the end of April is credited. This is confirmed by the medical report dated June 20, 1980, in the record as General Counsel's Exhibit 8 which states Darden had been released on April 25, 1980.⁵

Zemina told Darden that he could not come back to work but rather that he should try to stay on disability as long as possible, because Hank Williams was taking Respondent to the National Labor Relations Board.

In May 1980, Darden approached Frank Zemina stating that he needed \$125 to pay for car insurance. Despite considerable reluctance, Zemina made such a personal

⁴ During the course of the hearing Darden was shown a copy of a handwritten note Resp. Exh. 5 stating as follows:

3/5/80 \$1,500
deduct \$50 week until paid.

Darden testified that he recognized his signature on the copy but had no recollection of signing such a document. Darden further testified that the only note he recalled signing was G.C. Exh. 7. Since the ruling on Resp. Exh. 5 was deferred pending authentication of the document and such authentication was not completed, no findings are made on the basis of this document or the testimony related thereto.

⁵ The slip which Darden states he showed to Zemina to document his release was not produced by the General Counsel and is not in the record.

loan to Darden. In connection with that loan, Zemina asked Darden to do some work on his boat. Darden agreed to do the work and Zemina furnished the necessary materials such as paint, brushes, etc., to do the job. Darden in fact did not work on the boat and failed to return the materials furnished to him. Zemina did not ask whether Darden had a medical release to perform the work on the boat. Frank Zemina's admission that he failed to ask for Darden's medical release on this occasion compels the finding that it was not the failure to produce documentation of a physician's release that motivated Respondent's refusal to reinstate Darden.

3. Robert Blakeslee

In the second or third week of February 1980, after the union representative had visited Indian Head, Eugene Serafin told Robert Blakeslee to watch himself, because Indian Head's management was looking for mistakes.

On February 14, 1980, Robert Blakeslee was called into Frank Zemina's office and reprimanded on the ground that he had erroneously put transmission fluid into an oil tank. Blakeslee received a formal written warning concerning his incident, as well as one concerning his failure to pick up a check from a customer for a delivery he had made. Indian Head had issued no written formal warnings to its employees prior to the one given to Blakeslee in February 1980. Additional written warnings were issued to Blakeslee the following April.

4. The postelection meeting

At approximately 5 p.m. on March 5, 1980, Frank Zemina instructed the employees to report for a meeting. Present were Frank Zemina, Robert Blakeslee, Richard Whittaker, Eugene Serafin, Cary Darden, Paul Zemina, and John Calcagni. Richard Whittaker on that occasion asked Frank Zemina if he had any animosity to the employees. Zemina refused to answer but told Whittaker that he knew that Whittaker had instigated the union proceeding and that he knew who had voted for and against the Union.⁶ Zemina in his testimony admitted telling the employees on this occasion that apparently their reason for wanting the election was their feeling that working conditions were not satisfactory. Zemina also testified that he told the employees at this meeting "As far as I'm concerned it's over and done with. If you want to work for me, you can work for me. But, if you don't want to work for me, I have no strings or no ropes around anybody. I said, 'There's the door.'"

E. Changes in Working Conditions

1. Timeclock

Approximately a week after the election Respondent put in a timeclock. Prior thereto the employees had filled out their own timecards.

⁶ Zemina denied that he said that he knew who voted for the Union and who did not stating that he could presume who voted which way but he had no firm knowledge. Zemina admitted that he had told a Board agent prior to the hearing that he knew how the participants voted. Blakeslee confirmed the testimony of Whittaker stating that Zemina said he wanted no hard feelings, that he knew who voted for the Union and who did not, and that Whittaker had started the Union.

2. Written rules of conduct

Prior to March 1980, there were no written rules of conduct for employees of Indian Head. The work rules set forth in General Counsel's Exhibit 6 were given to Respondent's employees approximately a month after the election.

3. Coffee privileges

Respondent stopped the free coffee the first or second week of January 1980, after Williams, Whittaker, and Blakeslee had signed the union authorization cards. The coffee reappeared shortly after Williams had been laid off.

Discussion

The complaint herein charged multiple violations of the National Labor Relations Act in connection with the attempt to unionize the warehousemen and truckdrivers of Respondent, Indian Head Lubricants, Inc. The following violations of Section 8(a)(1) of the Act are alleged: interrogation of employees concerning their union sympathies, creating the impression that employees were under surveillance, threats of plant closure, and other unspecified threats of reprisal and offers of financial benefits to employees if they would reject the Union as a bargaining agent. Discriminatory actions alleged as violations of Section 8(a)(3) and (1) are the discharge of Henry Williams, the failure to reinstate Cary Darden III, withdrawal of coffee privileges, institution of a timeclock, and a formal disciplinary procedure, as well as providing financial benefits to employees to dissuade them from joining the Union.

A. Respondent's Responsibility for the Statements and Actions of Eugene Serafin, Connie Godshall, Ottie Zemina, and Paul Zemina

At the outset, it may be noted that Respondent urges that Eugene Serafin, Paul Zemina, Ottie Zemina, and Connie Godshall are not supervisors within the meaning of the Act, and therefore Indian Head cannot be held responsible for the acts and statements of these individuals.

Turning first to Eugene Serafin, the record shows that drivers reported to him, that on occasion he scheduled deliveries, that at times he regulated hours of work, and that Respondent's chief operating officer relied on him to keep employees busy. A supervisor within the meaning of Section 2(11) of the Act need not necessarily have authority to hire, transfer, suspend, or discipline other employees. It is sufficient if the individual in question responsibly directs the activities of other employees. Nor is it necessary that such power be exercised for any definite period or percentage of time. It is the existence of the power which determines whether the criteria of Section 2(11) have been met. Serafin's duties evidently require him to use independent judgment in supervising other employees and thus are within the Act's term "responsibly to direct." See *Ohio Power Co. v. N.L.R.B.*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899. Serafin's acts and statements may be imputed to Respondent.

In the case of Ottie Zemina, the record is clear that she was secretary of Respondent and that she and her husband were the only corporate officials of Indian Head. As such, her statements and acts may be imputed to Respondent. Under the circumstances, it is irrelevant that she may not have been on Respondent's payroll in the relevant period. There is no suggestion that her tenure as secretary of Indian Head was broken. In any event, the record shows that she spent a substantial amount of time working in the office during the critical period, and that she knew most of the approximately 20 people on Indian Head's payroll. Under the circumstances, the employees must have perceived her as having authority to act and speak for the corporation. See *William O. Hays d/b/a Superior Casting Co.*, 230 NLRB 1179, 1184 (1977).

Connie Godshall, Indian Head's bookkeeper, although not a supervisor, acted as Frank Zemina's agent in dealing with Henry Williams and Cary Darden III. In this connection, Darden's testimony that Frank Zemina told him that he could not speak to Darden, but that Godshall would do so is credited. Her activities in offering payoffs to Williams and Darden in return for antiunion votes were clearly ratified by Frank Zemina. Respondent's president ratified these actions when in his office he agreed to give Darden the \$1,500 payment previously discussed by Godshall and Darden. It is clear that, in her contacts with Darden and Williams, she acted as Respondent's agent, reflecting Respondent's views. Her statements may be imputed to Indian Head. See *Community Cash Stores*, 238 NLRB 265 (1978), *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974).

Paul Zemina, as the son of the only two corporate officers of a small closely held family corporation, has interests more clearly identified with management than with the other employees. *Caravelle Wood Products, Inc.*, 200 NLRB 855, 856 (1972); *Parisoff Drive-In Market, Inc.*, 201 NLRB 813 (1973). In addition, the filial relationship of Paul Zemina to the only two corporate officials and the sole stockholder of Indian Head (Frank Zemina) was likely to lead employees to believe that he was speaking for his father and the corporation. This is coupled with the fact that the statements he made reflected the antiunion sentiments of his parents. Under the circumstances, it is found that Paul Zemina was the agent of Respondent in making the statements in question. Indian Head may be held responsible for his actions.

B. Respondent's Offer and Payment of Financial Advancements to Subvert the Representation Election and Related Credibility Questions

The record is replete with conflicts in the testimony. General Counsel asserts that the allegations relating to offers of financial benefit are the "touchstone" of the Government's case. Accordingly, the evaluation of the record to resolve the conflicting testimony will begin at this point. Henry Williams and Cary Darden assert, and Frank Zemina, Indian Head's president, and Connie Godshall, Respondent's bookkeeper, deny that Williams and Darden were offered financial inducements to persuade them to reject the Union. The testimony of Williams and Darden is more persuasive. While the parties

disagree as to the motivation, one point is not in dispute. Frank Zemina gave Darden \$1,500 on March 5, 1980, a few hours after the Union lost the election.

A crucial point in evaluating the denials of Zemina and Godshall that a payoff had been discussed with Darden and that a payoff for Darden's vote was the motive of the \$1,500 payment is the fact admitted by Frank Zemina that on two occasions preceding the election he had refused to give Darden a loan at the latter's request. The inference is inescapable; the payment immediately following the election after two refusals prior thereto was a payoff for Darden's vote which was crucial to the outcome.

Zemina explained that he refused Darden's request for money in December 1979, because at that time Darden had a ride to work and did not need a car. Zemina explained the second refusal for money in January or February 1980, when Darden had lost his ride and did need a car, on the ground that he was afraid that this would be construed as showing favoritism at a time when the union organizing effort was pending. These explanations are unpersuasive and insufficient to overcome the inference compelled by the timing of the payment. It is significant that Zemina at another point in his testimony admitted that on March 5 he had tried to put off paying Darden on the ground "[t]hat now wasn't a good time, but he was rather insistent. Said that he had the car picked out." This admission compels the inference that Zemina was afraid that the March 5 payment would be construed as showing favoritism, but he overcame his reluctance at Darden's insistence, because he and Godshall had in fact previously offered to pay off Darden for his vote and he now had to make good on that offer.

Respondent argues that the \$1,500 payment to Darden represented a loan and was carried as such on its books. It makes little difference whether the \$1,500 payment in question was carried as a loan on Indian Head's books. Respondent in its brief describes Darden as "an employee with perpetual money problems and inability to manage his money" (Resp. br., p. 20). Zemina on the basis of his experience could hardly have had a realistic expectation of getting regular repayments.⁷ This fact also compels the finding that the money in question was a payoff to Darden for his vote. However the transaction may be technically described, it was clearly a financial inducement within the allegations of the complaint.

Zemina's explanation that he gave Darden a loan to keep Darden because he needed him as a minority employee to satisfy the requirements of a small business loan is unconvincing. He knew Darden as an employee with perpetual money problems and a 4-year prison record for armed robbery. Zemina's testimony to the contrary notwithstanding, there is no probative evidence in this record that minority truckdrivers without Darden's handicaps were not available.

The foregoing circumstances compel the finding that the \$1,500 was a payoff for Darden's vote. Accordingly, Darden's testimony concerning his contacts with Frank

⁷ While the record shows that Whittaker had received a loan from Respondent, there is no indication that he was irresponsible in financial matters as was Darden.

Zemina and Connie Godshall is found credible. Zemina's and Godshall's version of their contacts with Darden where they conflict with the latter's testimony is rejected.

Connie Godshall also contradicted the testimony of Henry Williams that she offered him money to take a stand against the Union. Her version is that she offered him a loan, when it was the birthday of his daughter, knowing that Williams was short of money. Williams' testimony that Godshall offered to pay his outstanding debt in return for his written agreement to work against the Union, and that at another point she held out her personal check to him post dated to March 6, stating "see I can do it," is more credible.⁸ Williams' testimony concerning the attempt to pay him off is corroborated by the actual payoff of Darden. Conversely, the payoff of Darden, which Godshall also denied, discredits her testimony on her contacts with Williams.

The finding that Godshall's and Frank Zemina's denial with respect to the offer and grant of financial inducements to Darden and Williams is not credible, detracts from their credibility when testifying on other issues.

C. Credibility of Ottie Zemina, Paul Zemina, and Eugene Serafin

The testimony of Henry Williams and Cary Darden III concerning their conversations and contacts with Ottie Zemina, Respondent's secretary, are un rebutted. Mrs. Zemina, the only person in a position to contradict this testimony, did not appear in this proceeding. This compels the inference that the testimony of Darden and Williams on these issues is true. Respondent argues that Mrs. Zemina's failure to testify is accounted for by her ill health. Mr. Zemina's testimony, however, is insufficient to establish her inability to testify on medical grounds. At a minimum, prerequisite to a convincing demonstration of Mrs. Zemina's inability to appear in this proceeding for reasons of health would be the affidavit or testimony of a physician.

Paul Zemina denies the statements attributed to him by Henry Williams; namely, asking Williams, "aren't you happy with the job and the money you are making here," and telling Williams after the disappearance of the coffee, "that and a lot of other favors around here are going to come to a stop." The statements attributed to Paul Zemina are consistent with the un rebutted antiunion statements and actions of his mother, also Indian Head's secretary, e.g., tearing up the NLRB notice signs in front of Williams after the election with a smile on her face, and telling Darden that if the Union came in Frank Zemina would close up shop and everybody would be out of work. Paul Zemina's statements made to Williams, moreover, are consistent with his father's hostility to the Union reflected by the payoff to Darden to cast an antiunion vote. Under the circumstances, Williams' testimony is more convincing than Paul Zemina's denials.

Insofar as Eugene Serafin is concerned the primary conflict in the testimony appears to be his denial that he told Robert Blakeslee to watch himself because manage-

ment would be watching him for mistakes. The testimony of Blakeslee on this point is credited; it is objectively documented by the formal disciplinary warnings issued to Blakeslee during the pendency of and after the union organizing effort. Significantly, Frank Zemina conceded that such written warnings had not been issued prior to February 1980.

D. The Layoff of Henry Williams and the Failure To Reinstale Cary Darden III

The parties disagree on the reason for the lay off of Henry Williams. General Counsel argues that Williams was laid off because of and in reprisal for his union activities. Respondent argues that Williams was laid off solely because of economic factors; i.e., a slowdown in Indian Head's business. The resolution of this issue is governed by the Board's decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), which reformulated the rule for determining causality in so-called dual-motive cases when the record indicates that both legitimate business reasons and the desire to retaliate for protested activities may have motivated the actions charged unlawful. Under *Wright Line, supra*, the test to be applied in 8(a)(3) cases turning on employer motivation is as follows. First, the General Counsel has the burden of making a *prima facie* showing that the protected activity was a motivating factor in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The record is replete with proof of Respondent's hostility to the organizing effort. Most significant is the attempted payoff of Williams to secure his vote against the Union and the successful effort to obtain Darden's antiunion vote by the financial inducement actually made to him. The record further demonstrates that Frank Zemina knew, or at a minimum, had sufficient knowledge to make an assumption as to who voted for and against the Union. Significantly, Mr. Zemina told a Board agent prior to the hearing that he knew who had voted for the Union. This admission, which is credited herein, is corroborated by the fact that he arranged for Darden to cast the deciding vote in a tied election. The failed attempt to secure Williams' vote for a \$600 payment also indicates that Zemina was aware of Williams' exercise of protected activities. Finally, Zemina, while discussing Darden's request for the \$1,500 prior to the election, threatened to fire Williams, Whittaker and Blakeslee for their union activities. Williams was subsequently laid off on March 21, 1980, some 16 days after the election. The record as a whole compels the inference that Williams was laid off because of his support of the Union. General Counsel accordingly has sustained his burden of proving a *prima facie* case under the rule of *Wright Line, Inc.*

Respondent, while denying that Williams' protected activities were a factor in his layoff, also argues that he would have been terminated even absent the exercise of such activities because of Indian Head's decline of business beginning in December 1979, and continuing through June 1980 (Resp. Br., pp. 6-8). The record

⁸ Godshall's statement "see I can do it" implied she had the authority of Frank Zemina to make the payment.

shows that there had been a slowdown in Indian Head's business in the period indicated. There are, however, a number of other factors to be considered in connection with Respondent's argument that Williams was laid off solely for economic reasons.

Williams received a 25-cent-an-hour raise on his base salary of \$5 an hour in January 1980, when Respondent's business slowdown was well underway. Darden received a \$2 raise on March 12, 1980, some 9 days before Williams was laid off. In addition, Frank Zemina gave Darden the \$1,500 on March 5, in the middle of the slowdown. Respondent, as already noted, could have had no realistic expectation of regular repayment in view of its knowledge of Darden's inability to handle money. This amount, moreover, exceeded by a considerable margin Williams' monthly take-home pay.⁹ Under the circumstances, Indian Head's argument that Williams was laid off for economic reasons is not convincing.¹⁰ Respondent has not sustained its burden under *Wright Line*, of demonstrating that the layoff would have taken place even in the absence of the protected conduct.

Williams' layoff, accordingly, violated Section 8(a)(3) and (1) of the Act and he is entitled to reinstatement.

General Counsel urges that Respondent refused to reinstate Cary Darden III subsequent to his release from a physician's care on April 25, 1980, for a job-related injury incurred on March 12, because such reinstatement would conflict with Respondent's asserted defense to the discharge of Williams (G.C. br. p. 32).

Darden's testimony that Respondent's chief operating officer refused to reinstate him to his job because of the Board proceeding instigated by Williams is credible. It is consistent with the payoff previously made to Darden which Zemina obviously had a motive to conceal. Reinstatement at that Point of Darden, who was junior to Williams, would undercut the economic justification for the latter's layoff and expose the discriminatory nature of the action. The additional advances to Darden after the March 5 election and subsequent to his injury are further circumstantial evidence of Zemina's desire to conceal the \$1,500 payment from the other employees and the discriminatory nature of Williams' layoff.

The General Counsel does not argue, and he cannot, that the failure to reinstate Darden is a discriminatory action aimed against Darden for engaging in protected activity under the Act. Rather, the failure to reinstate Darden was designed to perpetuate the discrimination against Williams for the latter's exercise of protected activity. That violation will be cured by a provision in the

order requiring that Williams be reinstated. As already noted, Darden did not engage in activity protected by the Act. Rather, he conspired with Respondent to subvert the representation election of March 5. In short, to a considerable degree, Darden himself is responsible for the train of events leading to Respondent's failure to reinstate. Under the circumstances, Darden is not entitled to a remedial order restoring him to his job.¹¹

E. The Violations of Section 8(a)(1)

1. Interrogation

The record shows that Paul Zemina asked Henry Williams, while the union organizing effort was pending, whether his father, Frank Zemina, had ever done anything to hurt Williams and whether Williams was unhappy with the money he was making at Indian Head. In the context of the then pending union organizing effort and other evidence of Respondent's animus to the Union, this questioning by Paul Zemina constituted coercive interrogation of Williams concerning his union sympathies.

In the case of Cary Darden III, he was asked by Frank Zemina whether anyone was bending his ear about the Union. Furthermore, Ottie Zemina as well as Connie Godshall asked him how he would vote in the forthcoming representation election. This too constituted interrogation of an employee concerning his union sympathies.

Interrogation of employees by their employer concerning their views about unions interferes with their Section 7 rights. An employee is entitled to keep those views from the employer so that he may exercise a full and free choice in this area. The foregoing interrogations of Williams and Darden violated Section 8(a)(1) of the Act.

2. Creating the impression of surveillance

Eugene Serafin, who responsibly directed Robert Blakeslee, told the latter during the pendency of the union organizing effort to watch himself because management was watching for mistakes.

Frank Zemina, at a postelection meeting of employees, stated that he knew who had voted for the Union and who had not. While Zemina denies making this statement, the testimony of Richard Whittaker and Robert Blakeslee that it was made is accepted. Their testimony is corroborated by Zemina's admission that he had told a Board agent prior to the hearing in this proceeding that he knew how the participants voted in the election.

Statements such as that employees are being watched for mistakes during a union organizing effort and statements to the effect that the employer knows how individuals voted in the representation election create the impression that the employees' union activities are or have been under surveillance. Such activity violates Sec-

⁹ The record shows that after January 1980 Williams received \$5.25 an hour. Assuming that Williams worked four 40-hour weeks a month, his monthly compensation would be approximately \$840.

¹⁰ General Counsel argues that the hiring of Ernest Nunziato probably in June or July 1980 as warehouse manager also demonstrates that Indian Head's lost business had nothing to do with Williams' layoff. Zemina was unable to recall the date that Nunziato was hired. According to Zemina, business was slow in the period December 1979 through May 1980. General Counsel's argument is rejected because of the uncertainty as to the hiring date of Nunziato. Moreover, as warehouse manager, Nunziato's duties were significantly different from those formerly performed by Williams. While the hiring of a supervisor at a higher salary so soon after Williams' layoff on the grounds of economic necessity may raise suspicion, the inferences to be drawn therefrom under the circumstances are at best conjectural and no findings are made thereon.

¹¹ Darden admitted to having a drinking problem in the period 1978 to March 1980, and that he had been hospitalized for alcoholism in April 1980. Since Darden is not entitled to reinstatement, there is no need to resolve the question of whether the employer is entitled to medical documentation of his cure. In any event, it would appear that the public is entitled to such assurance before he is put back on the road in his capacity as truckdriver.

tion 8(a)(1) of the Act since it tends to restrain and interfere with employees in the exercise of rights guaranteed under the Act. *Ste-Mel Signs, Inc.*, 246 NLRB 1110 (1979); *W. H. Scott d/b/a Scott's Wood Products*, 242 NLRB 1193 (1979).

3. Threats

The record shows that Ottie Zemina showed two men around Indian Head's premises, subsequently returned, and made it a point to tell Williams that the two men in question had made a substantial offer to purchase the business and to retain Frank Zemina to run it. She stated further "wouldn't that shake a few people up."¹²

Ottie Zemina some 3 weeks before the election told Darden that if the Union came in Frank Zemina would close the shop and everybody would be out of work. This incident further compels the inference that Mrs. Zemina's reference to Williams concerning the possible sale of the business was also intended to convey a threat to the employees' livelihood if they persisted in their union activities.

Connie Godshall told Darden some 3 weeks before the election that Frank Zemina would close the shop up if the Union came in. Her action in this respect is consistent with the statement of the two corporate officials Ottie and Frank Zemina.

Frank Zemina at the postelection meeting, according to his own testimony, stated essentially as follows: The election was over, and apparently the employees' reason for wanting it was dissatisfaction with working conditions. He stated further that the employees could work for him if they wanted to, but that if they did not wish to work under existing conditions "There's the door." In this context, Zemina's remarks concerning employee dissatisfaction must be construed as equating union activity protected by the Act with employee disloyalty and dissatisfaction. The phrase "There's the door" in the light of all the circumstances must be construed as an implied threat of firing in case of continued union activity. See *Bell Burglar Alarms, Inc.*, 245 NLRB 990 (1979).

Connie Godshall approximately a week and a half before the election threatened Williams with more onerous working conditions with respect to such matters as reporting time if he did not agree to work against the Union in return for the \$600 she had previously offered.

Paul Zemina in response to Williams' inquiring about the absence of coffee previously made available by the employer also threatened more onerous working conditions when he stated that this and a lot of other favors would stop.

The legality of the employer's conduct, when threats are in issue, does not turn on whether the employee feels threatened. Nor is the question whether the conduct under consideration was intended to and did in fact interfere with and coerce employees in the exercise of their rights under the Act. Rather the issue is whether the conduct has the tendency to interfere with the free exer-

cise of employees rights. *Bell Burglar Alarms, supra*. That standard has been met in this proceeding. The threats demonstrated by this record violate Section 8(a)(1) of the Act.

4. Promise of benefits

The record is clear that both Williams and Darden were offered financial inducements to vote against the Union. The details concerning those transactions have been set forth above and need not be repeated here. In addition, Williams was promised a job for life by Respondent's agent, Connie Godshall, if he would vote against the Union.

The promises of benefits were intended to stifle the organizing campaign. As such, they constituted an unlawful interference with employee rights. Respondent's practices in this respect, accordingly, violated Section 8(a)(1) of the Act.

F. The Violations of Section 8(a)(3) and (1)

Respondent's violation of Section 8(a)(3) and (1) by the lay off of Williams and the grant of financial benefits to Darden has already been described. Those details need not be repeated at this point.

1. Withdrawal of coffee privileges

Respondent argues that the withdrawal of free coffee in the first or second week of January, after Williams, Whittaker, and Blakeslee had contacted the Union, was unrelated to the ongoing organizational effort. Rather, Indian Head urges that this privilege was no longer made available because someone had thrown a quantity of the coffee out. The argument is rejected. Paul Zemina's statement that this and a lot of other favors would stop, when asked about the coffee's disappearance, compels the inference that Respondent took this step in retaliation for its employees' organization campaign. This inference is further supported by other displays of hostility to the Union on the part of the employer demonstrated by the record.

2. Institution of the timeclock and formal disciplinary procedures

The institution of the timeclock approximately a week after the election constituted a more rigorous time reporting procedure than had been in effect prior to the organizing effort. Respondent's argument that the clock had been ordered before the union campaign and therefore cannot be considered a reprisal thereto has been considered and rejected. Respondent's agent, Connie Godshall, as already noted, threatened Williams with tighter working conditions including reporting times. Paul Zemina had threatened a lot of favors would stop. Under the circumstances, it is immaterial at what point the timeclock had been ordered. It is clear that in that context its institution was in retaliation to the organizing effort and would be perceived as such by Respondent's employees.

The institution of a formal written warning procedure for infractions in the case of Robert Blakeslee, when this

¹² After the election, Ottie Zemina came to within 3-4 feet of Williams tearing up the NLRB notice signs with a grin on her face. This display of animus makes it clear that Mrs. Zemina's prior remarks to Williams were intended as a threat of selling the business because of the then current organizing effort.

had not been the practice prior to the organizing campaign, is also a discriminatory change in working conditions contravening employee rights under Section 7 of the Act. Serafin's warning to Blakeslee that Indian Head's management was watching for mistakes compels that inference. This action accordingly violated Section 8(a)(3) and (1).

G. The Timeliness of the Allegations in the Amended Complaint

Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. This section further provides that any complaint may be amended at any time prior to the issuance of an order based thereon.

Henry Williams' amended charge filed on September 30, 1980, added allegations that Respondent had made monetary payments to employees to discourage them from engaging in union activities and that Indian Head refused to reinstate Cary Darden because of union activities. The payoff to Darden taking place on March 5, 1980, occurred more than 6 months prior to the filing of the amended charge. The question remains whether in fact there was a need to file an amended charge in order to properly bring the payoff and the failure to reinstate Darden within the scope of the complaint.

A charge is not a formal pleading and its purpose is not to give notice to a respondent of the exact nature of the charges against him. As the Fifth Circuit held:

The charge rather, serves merely to set in motion the investigatory machinery of the Board. It is largely for the benefit of the Board, not the respondent, so that it may intelligently determine whether and to what extent an investigation is warranted. Consequently, the Board has considerable leeway to found a complaint on events other than those specifically set forth in the charge, the only limitation being that the Board may not get "so completely outside . . . the charge that it may be said to be initiating the proceeding on its own motion. . . ." [*Texas Industries, Inc. v. N.L.R.B.*, 336 F.2d 128, 132 (5th Cir. 1964).]

The requirement of a charge by Section 10(b), moreover, does not preclude "the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *N.L.R.B. v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), citing *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940). As the courts have stated, "To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce." *Id.* at 307-308.

Williams' original charge of April 1, 1980, alleged discrimination directed against him by a lay off because of his attempt to engage in protected activities; i.e., concerted action to organize the warehousemen and drivers of Indian Head. The offer of the payoff for Darden's antiunion vote are interrelated with Williams' attempt to organize the Respondent and to the latter's lay off for engaging in protected activity. Similarly, the refusal of the Respondent to reinstate Darden for the purpose of concealing the motive of Williams' lay off is interrelated with and grew out of the subject matter of the original charge. Under the circumstances, there was no need to amend the original charge and the complaint was properly amended pursuant to the provisions of Section 10(b) of the Act.

CONCLUSIONS OF LAW

1. Indian Head Lubricants, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 443, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with loss of benefits, plant closure, more onerous working conditions, and loss of employment, Respondent restrained, coerced, and interfered with employees in the enjoyment of their rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

4. By interrogating employees concerning their union membership, sympathies, and desires, Respondent restrained, coerced, and interfered with employees in the enjoyment of their rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

5. By creating the impression among its employees that their union activities were under surveillance, by promising employees financial benefits, and by offering employees financial benefits in order to dissuade them from supporting the Union, Respondent restrained, coerced, and interfered with employees in the enjoyment of their rights under Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

6. By discriminating against employee Henry Williams with respect to conditions of employment and by laying off Henry Williams thereby discouraging membership in the Union, Respondent violated Section 8(a)(1) of the Act.

7. By discriminating against its North Branford, Connecticut employees with respect to conditions of employment by withdrawing coffee privileges, instituting a time clock system, instituting a new disciplinary program, and by paying employees money, thereby discouraging membership in the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend it be ordered to cease

and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent laid off Henry Williams on March 21, 1980, in violation of Section 8(a)(3) and (1) of the Act, the recommended Order will provide that the Respondent shall offer him reinstatement to his job and make him whole for loss of earnings or other benefits within the meaning and in accord with the Board's decisions in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), except as specifically modified by the wording of such recommended Order.

Upon the findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹³

The Respondent, Indian Head Lubricants, Inc., North Branford, Connecticut, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening plant closures, loss of benefits, more onerous working conditions, and loss of employment or threatening to take any other discriminatory action to discourage employee exercise of rights protected under the National Labor Relations Act.

(b) Coercively interrogating employees concerning union matters or organizational activities.

(c) Creating the impression of engaging in surveillance of employees' union activities or engaging in the surveillance of employees' union activities.

(d) Laying off or otherwise discriminating against any employee in regard to hire or tenure of employment or any other condition of employment because of his exercise of activities protected by the Act.

(e) Offering financial or other benefits to employees in order to dissuade them from supporting the Union.

(f) Paying or granting financial benefits or other benefits to employees to dissuade them from supporting the Union.

(g) Discriminatorily changing the conditions of employment by measures such as withdrawing coffee privileges; instituting a time clock and a formal disciplinary procedure to discourage membership in the Union.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer employee Henry Williams immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him as a result of the discrimination practiced against him, in the

¹³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

manner described above in the section of this Decision entitled "Remedy."

(b) Rescind use of the timeclock and the formal disciplinary procedure instituted to discourage employee membership in the Union.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its North Branford, Connecticut facility, copies of the attached notice marked, "Appendix."¹⁴ Copies of said notice, on forms provided by the Regional Director for Subregion 39, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Subregion 39, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten plant closures, loss of benefits, more onerous working conditions, loss of employment or threaten to take any other discriminatory action to discourage employee exercise of rights protected under the National Labor Relations Act.

WE WILL NOT coercively interrogate employees concerning union matters or organizational activities.

WE WILL NOT engage in surveillance of employees' Union activities or take action designed to create the impression that we are engaged in the surveillance of our employees' Union activities.

WE WILL NOT lay you off or otherwise take discriminatory action against you in regard to the hire or tenure of employment or any other conditions of employment because of your exercise of activities protected by the National Labor Relations Act.

WE WILL NOT offer financial or other benefits to employees in order to dissuade them from supporting the Union.

WE WILL NOT pay or grant financial benefits or other benefits to employees to dissuade them from supporting the Union.

WE WILL NOT discriminatorily change the conditions of employment to discourage membership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Henry William immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay suffered by him as a result of the discrimination practiced against him with interest.

WE WILL rescind use of the timeclock and the formal disciplinary procedure instituted as reprisal for union organizational activity.

INDIAN HEAD LUBRICANTS, INC.